

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

In The Matter Of:)		
)		
THELMA LASLEY,)		
)		
Complainant,)		
)	Charge No.	1998 CF 2212
and)	ALS No.	10777
)		
COMBINED INSURANCE COMPANY,)		
)		
Respondent.)		

ORDER AND DECISION

March 8, 2004

The Commission by a panel of three:
Commissioners Munir Muhammad, Arabel Alva Rosales, and Daniel C. Sprehe
presiding.

On review of the recommended orders of William Hall, Administrative Law Judge.

For Complainant: Timothy M. Kelly
Beermann, Swerdlove, Woloshin, Barezky, Becker, Genin &
London

For Respondent: Marc Fisher

Illinois Human Rights Commission: James E. Snyder, General Counsel,
Matthew Z. Hammoudeh, Asst. General Counsel.

This matter comes before the Commission pursuant to a Recommended Order and Decision issued by Administrative Law Judge William H. Hall and exceptions filed thereto.

On review of Judge Hall's recommendations, the public hearing record and the exceptions and response filed by the parties and for the reasons set forth herein, the recommendations of Judge Hall are sustained in part and modified in part.

The findings of the Recommended Order and Decision are sustained, subject to the following modification:

The Complainant is not awarded the \$30,400 she withdrew from her pension after her termination as recommended by Judge Hall.

I. Nature of the Case

The Illinois Department of Human Rights filed a complaint on behalf of Thelma Lasley (Complainant), against Combined Insurance Company (Respondent). The Complainant charged that the Respondent discriminated against her on the basis of race when it terminated her for falsifying time sheets.

II. Proceedings

Following a public hearing, Administrative Law Judge William H. Hall issued a Recommended Liability Determination and Recommended Order and Decision. Judge Hall found that the Complainant was in fact terminated as the result of race discrimination.

Judge Hall found that the Complainant is an “aggrieved party” as defined by section 1-103 (B) of the Illinois human Rights Act, 775 ILCS 5/101 et seq. (1999) (The Act); that the Respondent is an “employer” as defined by section 2-101 (B) (1) (c) of the Act and is subject to provisions of the Act; and that the evidence admitted during the public hearing on this matter, was sufficient to prove that the Respondent unlawfully discriminated against the Complainant.

Judge Hall recommends that the complaint in this matter be sustained and that the Complainant be awarded the sum of \$70,197.83 for lost back pay; prejudgment interest on the back pay award; the sum of \$14,800 for her health insurance payments paid after her termination; \$30,400, the amount that she had to withdraw from her pension after her termination; \$8000 for emotional harm and mental suffering; reinstatement to her former position; and reasonable attorney’s fees and costs incurred in the prosecution of this matter.

The Respondent filed exceptions and the Complainant filed a response to the exceptions. Oral Arguments were heard on December 17, 2003.

III. Standard of Review

In reviewing an Administrative Law Judges’ Recommendation Order and Decision, the Commission does not conduct a *de novo* review of the evidence; rather, the Commission will adopt the Judge’s findings unless they are contrary to the manifest weight of the evidence presented at the hearing. 775 ILCS 5/8A-103(E)(2). Any findings of fact made by the Judge will be found by the Commission to be against the manifest weight of the evidence only if an opposite conclusion is clearly evident upon a reading of the record. *Irick v. Illinois Human Right Commission*, 311 Ill.App.3d 929, 935, 726 N.E.2d 167, 172. The Commission reviews a question of law *de novo* and is empowered to modify, reverse, or sustain the Judge’s recommendations, in whole or in part. 775 ILCS 5/8A-103(E).

a) Mitigation of Damages

The Respondent took exception to the Judge's finding that the Complainant mitigated her damages and argues that the Complainant's failure to mitigate her damages requires the exclusion of any back pay award.

Mitigation of damages is an affirmative defense upon which the employer bears the burden of proof. *ISS International Service System, Inc. v. Illinois Human Rights Commission*, 272 Ill.App3d 969, 651 N.E.2d 592, 598 (1st Dist. 1995). It is the employers' burden to prove a failure to mitigate damages. The Complainant has a duty to exercise reasonable diligence in attempting to mitigate damages by finding comparable work. The Complainant testified that she earned approximately \$20,000 for babysitting, (*Tr.*, pg. 252).

The Respondent did not demonstrate that Judge Hall's finding, that the Complainant satisfied her duty to mitigate damages, was against the manifest weight of the evidence. This finding is sustained.

b) Prejudgment Interest

The Respondent took exception to the award of prejudgment interest and argues that the inclusion of prejudgment interest in the back pay award is inappropriate.

Prejudgment interest compensates for the loss of the use of money for a time and that interest is specifically authorized by Section 8A-104(j) of the Human Rights Act as "make whole" relief. 775 ILCS 5/8A-104(J). The record indicates that the Respondent enjoyed the benefit of the use of this money for more than five years; therefore, Judge Hall's recommendation regarding prejudgment interest is supported by the manifest weight of the evidence and the award of prejudgment interest to the Complainant is upheld.

c) Pension Award

The Respondent took exception to the pension award.

Judge Hall found that since the Complainant withdrew \$30,400 from her pension for living expenses she is entitled to be reimbursed.

A back pay award should put the Complainant in the position she would have been in regarding salary, raises, sick leave, vacation pay, pension and other fringe benefits. *Clark v. Human Rights Commission*, 141 Ill.App.3d 178, 490 N.E.2d 29 (1st District, 1986).

In this case, the Complainant withdrew \$30,400 from a pension fund; this was money she utilized in lieu of her pay from Respondent. Therefore the recommended back pay award of \$70,197.83 included money she spent in absence of her pay, including the \$30,400 she withdrew from her pension. In sum, the Complainant withdrawing money from a pension fund, or any other place for that matter, does not entitle her to a larger back pay award. To the extent to which they are proved, the Complainant is entitled to such damages as are authorized by the Act. For example, the Complainant has demonstrated

that she is entitled to back pay and emotional distress damages, and we are authorized by the Act to award such damages. The Act does not authorize us to do award punitive, speculative or consequential damages.

Judge Hall's recommendation of an award for "emotional harm and mental suffering" is sustained. The Act does not authorize "emotional harm" or "mental suffering" damages, but we believe this was an error of terms. The Act authorizes the Commission to award damages for emotional distress, and we accept Judge Hall's recommendation on that issue.

Judge Hall's recommendation, that the Respondent reimburse the Complainant the \$30,400 she withdrew from her pension after her termination, is reversed. As a matter of law, these damages are not available under the Act.

The Complainant is not entitled to the \$30,400 pension award.

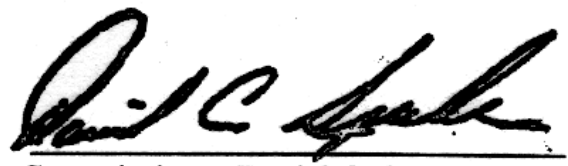
IT IS HEREBY ORDERED THAT:

The Recommended Order & Decision issued in this case is sustained in part and modified in part and is incorporated herein as our Order & Decision.

This is a final order. The parties may seek rehearing of this Order & Decision by the full Human Rights Commission en banc pursuant to 775 ILCS 5/8A-103 (F).

STATE OF ILLINOIS
Entered this 8th day of March 2004.

HUMAN RIGHTS COMMISSION


Commissioner Munir Muhammad
Commissioner Arabel Alva Rosales
Commissioner Daniel C. Sprehe